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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE ALBERTO ANTONIO,

Defendant and Appellant.

D066753

(Super. Ct. No. SCN316868)

APPEAL from an order of the Superior Court of San Diego County, Michael J. Popkins, Judge. Sentence vacated and remanded with directions.

Daniel Yeager, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson, Kristine A. Gutierrez and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

Jose Alberto Antonio entered into a plea agreement. Pursuant to the agreement. Antonio pleaded guilty to one count of residential robbery (Pen. Code,<sup>1</sup> §§ 211, 212.5). He also admitted the use of a firearm during the robbery (§ 12022.5, subd. (a)). The parties stipulated that Antonio would be sentenced to an eight-year prison term. The remaining counts and allegations were dismissed. In April 2014, the court sentenced Antonio in accordance with the plea agreement. Thereafter the court recalled the sentence to permit the parties to discuss a federal case in which Antonio had been sentenced to 10 years in federal prison. In August 2014, the court again sentenced Antonio, but declined to decide whether the state sentence should be served concurrently or consecutively.

Antonio appeals contending the trial court erred in failing to determine whether the state sentence should be served concurrently with or consecutively to the federal sentence. He argues the court's failure to state how the sentence should be served defaults to a concurrent sentence under section 669. Antonio further argues that if a consecutive sentence is imposed it must be treated as a subordinate term to the federal sentence and calculated at one-third the midterm under section 1170.1, subdivision (a). Antonio acknowledges that case law has rejected the contention that section 1170.1 applies where the other sentence is not from a California court. (*People v. Veasey* (1979) 98 Cal.App.3d 779, 786-787 (*Veasey*).) Antonio contends *Veasey* was wrongly decided.

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise specified.

The People have responded contending the appeal must be dismissed because Antonio did not obtain a certificate of probable cause and is seeking to challenge the bargained for sentence. (*People v. Panizzon* (1996) 13 Cal.4th 68, 79-80 (*Panizzon*).) As a separate ground for dismissal, the People contend Antonio has waived the right to appeal from his sentence as part of the change of plea. If those arguments fail, the People contend the case must be remanded to the trial court so that the trial court can make a decision on concurrent or consecutive sentencing.

We will reject Antonio's arguments and conclude the trial court must decide how the sentence is to be served as related to the federal sentence. We will also conclude that the one-third of the midterm rule of section 1170.1 does not apply where the other sentence is not from a California court. We will reject the People's arguments for dismissal of the appeal and remand to the trial court with directions to decide whether the sentence in this case should run concurrently with or consecutive to the federal sentence.

#### STATEMENT OF FACTS

The facts of the underlying offense are not relevant to any of the issues raised in this appeal. Suffice that the probation report shows that Antonio and another entered a house, robbed the occupants at gun point and pistol whipped one of them.

#### DISCUSSION

Since the People have argued that we should dismiss this appeal we will first deal with those arguments. Then we will turn to the merits of Antonio's contentions.

#### A. Lack of Certificate of Probable Cause

Antonio did not receive a certificate of probable cause with his notice of appeal. Thus, under section 1237.5, he may not challenge his guilty plea on appeal, which he does not do here. Ordinarily, a defendant, after a guilty plea, may challenge the sentence imposed as a matter occurring after the plea. (*People v. Mendez* (1999) 19 Cal.4th 1084; Cal. Rules of Court, rule 8.304(b)(4)(b). There is an exception to the general rule that allows challenges to the sentence imposed. Where the plea agreement has a sentence that is an essential term of the bargain, a defendant may not challenge the agreed upon sentence without first obtaining a certificate of probable cause. (*Panizzon, supra*, 13 Cal.4th at pp. 73-74, 78.)

The People contend that the rule of *Panizzon, supra*, 13 Cal.4th 68, should apply here. They reason that Antonio agreed to the sentence of eight years. He also agreed to give up his right to appeal "any sentence stipulated herein." Thus, the People argue that Antonio is challenging the stipulated sentence and that allowing an appeal would violate the terms of the agreement. We respectfully disagree.

Antonio does not challenge the eight-year term. His contention is that the court erred in failing to decide whether that term should be served concurrently with or consecutive to the 10-year federal term. We do not construe this appeal to challenge the agreed term nor is this appeal inconsistent with the waiver of appellate rights contained in the change of plea form. Therefore, we decline to dismiss this appeal since there is no violation of the rule established in *Panizzon, supra*, 13 Cal.4th 68.

## B. The Sentence

The sentencing process in this case appears to have been fraught with confusion. Apparently, the parties, with the possible exception of Antonio, did not know about the federal case before the plea was taken in this case. At the March 2014 sentencing defense counsel asked that the state sentence run concurrently with the federal sentence. The prosecutor objected. The court, apparently assuming section 1170.1 applied to consecutive sentencing when a foreign conviction is involved, told the prosecutor that a consecutive sentence here would have to be imposed at one-third the midterm, which would be two years eight months; advice which was erroneous. Thereafter, the court did not decide how the current sentence would be served

In July 2014, the court recalled the sentence so that the parties could confer with federal officials. The result of conferring was that federal officials advised they would not pick up Antonio until after his state term was completed. Since the parties could not agree how to resolve their problem, the court simply reimposed the original eight-year sentence and said: "I'm not going to make any comment on whether it [the sentence] should be run concurrent or consecutive with the federal system. As you [counsel] said, it probably won't matter."

The essence of this appeal is that the trial court should have ordered the sentences to run concurrently and that in any event the default provision of section 669 compels imposition of a concurrent term. Section 669 provides, in part: "(a) When a person is convicted of two or more crimes, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same judge or by

different judges, the second or other subsequent judgment upon which sentence is ordered to be executed shall direct whether the terms of imprisonment or any of them to which he or she is to be sentenced shall run concurrently or consecutively. . . . [¶]

(b) . . . Upon the failure of the court to determine how the terms of imprisonment on the second or subsequent judgment shall run, the term of imprisonment . . . shall run concurrently." Antonio contends the court's failure to make a decision should default to a concurrent sentence.

The People argue that the better result would be for this court to remand the case to the trial court for further proceedings "as may be just under the circumstances" under section 1260. (*People v. Smith* (1997) 59 Cal.App.4th 46, 50-51.) We agree with the People's argument on this issue.

As we have noted, there was substantial confusion among the court and the parties as to what the court should do in light of the federal sentence and the government's position that they would not pick up Antonio until his state term was completed. The confusion was compounded by the court's erroneous assumption that the state sentence would have to be imposed at one-third the midterm, instead of a full strength eight-year sentence. In light of the unique circumstances in this case we decline to apply the default provisions of section 669 and will remand the case to the trial court with directions to conduct further proceedings and to decide whether the sentence in this case should be concurrent or consecutive with the federal sentence.

Before we complete this opinion, we will briefly pause to address the question of how to calculate any consecutive sentence.

In many instances, where there is consecutive sentences imposed in California felony cases, the court must determine the principal term and then determine the subordinate term(s). Absent some special statute, consecutive sentences are calculated at one-third the midterm. (§ 1170.1, subd. (a).) In the present case the trial court erroneously assumed that this principle applied to foreign convictions.

Antonio acknowledges the only case law on the subject holds to the contrary. In *Veasey, supra*, 98 Cal.App.3d at pages 788 to 790, the court held that section 1170.1, subdivision (a) did not apply where one of the convictions is not from a California court. Antonio claims that *Veasey* was wrongly decided and that rule 4.451(b) of the California Rules of Court, relied upon by the court is unconstitutional as it is inconsistent with statute. We disagree. We have reviewed the opinion in *Veasey* and we are satisfied it is an accurate interpretation of statute. We will follow the reasoning in *Veasey*.

To be clear, we understand the trial court did not decide to impose either a consecutive or concurrent sentence. However, the crux of the confusion in the trial court is largely the court's erroneous interpretation of section 1170.1, subdivision (a). If, on remand the trial court determines to impose a consecutive sentence, it must impose the entire eight-year term consecutively to the federal sentence. We express no opinion as to which form of sentencing should be imposed here.

#### DISPOSITION

The sentence imposed in this case is vacated. The case is remanded to the trial court with directions to conduct a new sentencing hearing at which hearing the court must

decide whether the sentence in this case should be imposed concurrently with or consecutive to the federal sentence.

HUFFMAN, Acting P. J.

WE CONCUR:

NARES, J.

PRAGER, J.\*

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\* Judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.